

MAJOR EBERHART,
Petitioner,
v.
M. SPEARMAN,
Respondent.

Case No. [18-cv-02718-EMC](#)

ORDER OF DISMISSAL

Docket No. 11

I. INTRODUCTION

Major Eberhart, a California state prisoner, filed this *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction from the Contra Costa County Superior Court. Respondent now moves to dismiss the petition as barred by the *Younger* doctrine because the criminal appeal is still pending. Mr. Eberhart opposes the motion. For the reasons stated below, the Court **GRANTS** Respondent's motion to dismiss the petition.

II. BACKGROUND

Mr. Eberhart was convicted in Contra Costa County Superior Court of first degree murder and other offenses “related to a jewelry store robbery that was followed by an incident in which Eberhart shot another one of the robbers as they were dividing up the robbery proceeds.” *People v. Eberhart*, 2015 WL 5138555, *1 (Cal. Ct. App. Sept. 1, 2015). Several sentence enhancement allegations were found true. The court imposed a sentence totaling 91 years to life in state prison. *Id.* The California Court of Appeal affirmed the conviction but required a modification of the abstract of judgment with regard to a sentence enhancement, and remanded for a retrial of prior conviction allegations and for resentencing. *Id.* at *18. On June 29, 2018, Mr. Eberhart was resentenced in the same case. Docket No. 11 at 1. His state court appeal following that

1 resentencing is still pending. *Id.* According to the California state court website, respondent's
2 opening brief on appeal was due on December 10, 2018. *See People v. Eberhart*, Case No.
3 A154829 (Nov. 14, 2018 docket entry), available at <http://appellatecases.courtinfo.ca.gov>. In
4 other words, Mr. Eberhart's direct appeal is currently pending in the California Court of Appeal.

5 Before Mr. Eberhart was resentenced, he filed this action for a federal writ of habeas
6 corpus on May 9, 2018, to challenge his conviction.

III. DISCUSSION

8 Respondent moves to dismiss the case on the basis of abstention because petitioner's direct
9 appeal is still pending. Mr. Eberhart does not dispute that his direct appeal following the
10 resentencing is still pending. In his opposition, he requests that this action be dismissed without
11 prejudice if it must be dismissed. Docket No. 13.

Under principles of comity and federalism, a federal court should not interfere with ongoing state criminal proceedings by granting injunctive or declaratory relief absent extraordinary circumstances. *See Younger v. Harris*, 401 U.S. 37, 43-54 (1971). The rationale of *Younger* applies throughout appellate proceedings, requiring that state appellate review of a state court judgment be exhausted before federal court intervention is permitted. *See Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994) (even if criminal trials were completed at time of abstention decision, state court proceedings still considered pending). These concerns are especially important in the habeas context where a state prisoner's conviction may be reversed on appeal, thereby rendering the federal issue moot. *See Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). Absent extraordinary circumstances, abstention under the *Younger* principle is required when: (1) state judicial proceedings are ongoing; (2) the state proceedings implicate important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so. *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir. 2008).

27 Here, all of the *Younger* criteria are satisfied. First, the direct appeal in Mr. Eberhart's
28 criminal case is pending in the California Court of Appeal. Thus, state judicial proceedings are

1 ongoing. Second, state criminal proceedings involve important state interests. *See Kelly v.*
2 *Robinson*, 479 U.S. 36, 49 (1986) (citing *Younger*, 401 U.S. at 44-45) (“This Court has recognized
3 that the States’ interest in administering their criminal justice systems free from federal
4 interference is one of the most powerful of the considerations that should influence a court
5 considering equitable types of relief.”). Third, Mr. Eberhart is not barred from litigating his
6 federal constitutional issues in state court. Fourth, the underlying federal petition threatens to
7 interfere with the state criminal proceedings in a manner that *Younger* disapproves by inserting
8 federal court oversight into an ongoing state criminal proceeding. Accordingly, abstention is
9 appropriate here.

10 The exhaustion-of-state-remedies rule requires that prisoners in state custody who wish to
11 challenge collaterally in federal habeas proceedings either the fact or length of their confinement
12 must first exhaust state judicial remedies, either on direct appeal or through collateral proceedings,
13 by presenting the highest state court available with a fair opportunity to rule on the merits of each
14 and every claim. *See* 28 U.S.C. § 2254(b)-(c); *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982). Even
15 when the petitioner has exhausted his state remedies for the claims contained in the federal
16 petition for writ of habeas corpus, *Younger* abstention is appropriate if there still is an appeal
17 pending in state court. *See Sherwood*, 716 F.2d at 634. “When, as in the present case, an appeal
18 of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the
19 outcome of his appeal before his state remedies are exhausted, even where the issue to be
20 challenged in the writ of habeas corpus has been finally settled in the state courts.” *Id.* Although
21 the claims contained in Mr. Eberhart’s federal habeas petition may have been presented in his first
22 state court appeal, the existence of his now-pending second state court appeal (following the
23 resentencing proceedings) supports *Younger* abstention in this action. Waiting until the
24 conclusion of the second state court appeal will not work to the detriment of Mr. Eberhart because,
25 as Respondent states, “[s]ince petitioner’s resentencing constitutes a new judgment, he will have
26 the opportunity to raise all of his claims once the amended judgment becomes final” upon the
27 conclusion of direct review. Docket No. 11 at 4-5.

28 Due to the direct appeal pending in the California Court of Appeal, this action will be

1 dismissed under the *Younger* abstention doctrine. The dismissal will be without prejudice to Mr.
2 Eberhart filing a new petition for writ of habeas corpus asserting all of his claims after his direct
3 appeal is finished. Because there is a one-year statute of limitations for the filing of a federal
4 petition for writ of habeas corpus, *see 28 U.S.C. § 2244(d)*, *Mr. Eberhart is cautioned to act*
5 *swiftly to return to federal court with his new petition for writ of habeas corpus when the direct*
6 *appeal concludes.*

7 A certificate of appealability will not issue. *See 28 U.S.C. § 2253(c).* This is not a case in
8 which “jurists of reason would find it debatable whether the petition states a valid claim of the
9 denial of a constitutional right and that jurists of reason would find it debatable whether the
10 district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

11 **IV. CONCLUSION**

12 Respondent’s motion to dismiss the petition is **GRANTED**. Docket No. 11. This action is
13 **DISMISSED** without prejudice to Mr. Eberhart filing a new petition for writ of habeas corpus
14 asserting all of his claims after his direct appeal is finished. The Clerk shall close the file.

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16 **IT IS SO ORDERED.**

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18 Dated: December 21, 2018

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EDWARD M. CHEN
United States District Judge